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No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,
*Respondent/Appellant,*

V.

THE CITY OF HUNTINGTON, WEST VIRGINIA,
*Petitioner/Appellee.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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35 pp

## QUESTIONS PRESENTED FOR REVIEW

For its questions presented for review before this Court, your Petitioner states as follows:

1. That the United States Court of Appeals for the Fourth Circuit erred in holding that the fire and flood protection charges imposed by the City of Huntington, West Virginia are taxes upon the United States of America.

2. That the United States Court of Appeals for the Fourth Circuit erred in its failure to hold that federal law already provides that the United States of America shall pay a fire service or its parent jurisdiction for the support of fire protection services on federal properties and further, misinterpreted and misapplied Title 15 U. S. C. Section 2210.

3. That the United States Court of Appeals for the Fourth Circuit erred in holding that there is no relevant distinction between the square footage basis for assessment of users' fees and the *ad valorem* method.

## LISTING OF PARTIES TO THIS PROCEDURE

Now comes your Petitioner, and for its listing of parties states as follows:

1. That your Petitioner has been represented at the District Court and before the Fourth Circuit Court of Appeals by Frederick G. Staker, III, City Attorney, The City of Huntington, Post Office Box 1659, Huntington, West Virginia 25717-1659.

2. That the United States of America has been represented at the District Court by Michael W. Carey, United States Attorney and Stephen M. Horn, Assistant United States Attorney, Post Office Box 3234, Charleston, West Virginia 25332; and before the Fourth Circuit Court of Appeals by James A. Bruton, Acting Assistant Attorney General, and Gary R. Allan, David English Carmack and Edward T. Perelmuter, Attorneys, Tax Division, United States Department of Justice, Post Office Box 502, Washington, D. C. 20044, and by Michael W. Carey, United States Attorney, Post Office Box 3234, Charleston, West Virginia 25332.

## TABLE OF CONTENTS

Questions Presented for Review ..... i

List of Parties ..... ii

Table of Authorities ..... iii

Reports of Opinions Delivered in Case ..... 1

Statement of Grounds of Jurisdiction ..... 1

Provisions of Law Involved in Case ..... 1

Concise Statement of Case ..... 8

Arguments ..... 11

1. The Fire And Flood Protection Charges Are Not Taxes On The United States And Are Not In Violation Of The Supremacy Clause Of The Constitution. ..... 11

2. Federal law already provides that the United States Government shall pay a fire service or its parent jurisdiction for the support of fire protection services on federal properties ..... 13

3. There is a relevant difference between the square footage method of assessment and the ad valorem method ..... 15

Conclusion ..... 17

Appendix ..... A-1

## TABLE OF AUTHORITIES

**Cases:**

*City of Charleston v. Board of Education of Kanawha County*, 209 S.E.2d 55 (W. Va. 1974) ..... 11

*City of Huntington v. Chianesi*, Circuit Court of Cabell County, West Virginia, Civil Action No. 84-290 (1985) ..... 11, 12

*City of Huntington v. SGM, Inc.*, Circuit Court of Cabell County, West Virginia, Civil Action No. 91C-567 (1992) ..... 12, 13

*Ellison v. City of Parkersburg*, 284 S.E.2d 903 (W. Va. 1984) ..... 16

*Packet Co. v. Keokuk*, 95 U.S. 80, 25 L.Ed. 377 (1877) ..... 11

*Huse v. Glover*, 110 U.S. 543, 7 S.Ct. 313, 30 L.Ed. 487 (1886) ..... 11

*Streski v. City of Wheeling*, Circuit Court of Ohio County, West Virginia, Civil Action No. 83-C-787-W (1984) ..... 16

*United States of America v. City of Huntington*, U. S. District Court, Southern District of West Virginia, Civil Action No. 3: 92-0294 (1992) ..... 12, 13

**Statutes:**

15 U.S.C. Section 2210 ..... 1, 2, 13, 14, 15

28 U.S.C. Section 1254 ..... 1

West Virginia Code Section 8-13-13 ..... 2, 3

City of Huntington, West Virginia Ordinance, Article 773 ..... 3, 4, 5, 6, 7, 8

City of Huntington, West Virginia Ordinance, Article 955 ..... 5, 6

**Miscellaneous:**

1 Cooley, Taxation, Section 36 (4th Ed. 1924) ..... 11

West Virginia Const., Article X, Section 1 ..... 12

## REPORTS OF OPINIONS DELIVERED IN CASE

Your Petitioner's PETITION FOR WRIT OF CERTIORARI arises from a published decision dated June 10, 1993, by the United States Court of Appeals for the Fourth Circuit in that certain matter styled United States of America, Plaintiff/Appellant vs. The City of Huntington, West Virginia, Defendant/Appellee, No. 92-2074. In that decision, the Fourth Circuit Court of Appeals reversed the decision of the District Court dated July 7, 1992.

## STATEMENT OF GROUNDS OF JURISDICTION

The judgment of the Fourth Circuit Court of Appeals sought to be reviewed was entered June 10, 1993. Petitioner's counsel filed a PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC which were denied by the Court's Order of July 6, 1993. The statutory provisions believed to confer jurisdiction on this Court to review said judgments are found in Title 28 U. S. C. Section 1254.

## PROVISIONS OF LAW INVOLVED IN CASE

The applicable provisions of law involved in this case are as follows:

UNITED STATES CODE
Title 15 U. S. C. Section 2210:

**Section 2210. Reimbursement for costs of firefighting on federal property.**

**(a) Filing of claims.** Each fire service that engages in the fighting of a fire on property which is under the jurisdiction of the United States may file a claim with the Administrator for the amount of direct expenses and direct losses incurred by such fire service as a result of fighting such fire. The claim shall include such supporting information as the Administrator may prescribe.

**(b) Determination**. Upon receipt of a claim filed under subsection (a) of this section, the Administrator shall determine—

(1) what payments, if any, to the fire service or its parent jurisdiction, including taxes or payments in lieu of taxes, the United States has made for the support of fire services on the property in question;

(2) the extent to which the fire service incurred additional firefighting costs, over and above its normal operating costs, in connection with the fire which is the subject of the claim; and

(3) the amount, if any, of the additional costs referred to in paragraph (2) of this subsection which were not adequately covered by the payments referred to in paragraph (1) of this subsection.

**(c) Payment**. The Secretary shall forward the claim and a copy of the Administrator's determination under subsection (b)(3) of this section to the Secretary of the Treasury. The Secretary of the Treasury shall, upon receipt of the claim and determination, pay such fire service or its parent jurisdiction, from any moneys in the Treasury not otherwise appropriated but subject to reimbursement (from any appropriations which may be available or which may be made available for the purpose) by the Federal department or agency under whose jurisdiction the fire occurred, a sum no greater than the amount determined with respect to the claim under subsection (b)(3) of this section.

**(d) Adjudication**. In the case of a dispute arising in connection with a claim under this section, the Court of Claims of the United States shall have jurisdiction to adjudicate the claim and enter judgment accordingly. (Oct. 29, 1974, P. L. 93-498, Section 11, 88 Stat. 1543.)

WEST VIRGINIA CODE

Section 8-13-13 **Special charges for municipal services.**

Notwithstanding any charter provisions to the contrary, every municipality which furnishes any essential or special municipal service, including, but not limited to, police and fire protection, parking facilities on the streets or otherwise, parks and recreational facilities, street

cleaning, street lighting, street maintenance and improvement, sewerage and sewage disposal, and the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter, shall have plenary power and authority to provide by ordinance for the installation, continuance, maintenance or improvement of such service, to make reasonable regulations with respect thereto, and to impose by ordinance upon the users of such service reasonable rates, fees and charges to be collected in the manner specified in the ordinance. * * *

## ORDINANCES OF THE CITY OF HUNTINGTON, WEST VIRGINIA:

Section 773.01 Continuance, Maintenance and Improvement Of Fire Protection Service. (July 30, 1985)

Pursuant to West Virginia Code 8-13-13, the service of fire protection shall be continued, maintained and improved by the City, in part, at the expense of the users of such service. The owners and tenants of all structures, residential and nonresidential, and owners of all vehicles are declared to be the users and beneficiaries of such fire protection service. The charges and expenses with respect to each of such users and beneficiaries shall be determined, ascertained, assessed and collected as set out in this article.

The charges and expenses with respect to each of such users as set out in this article shall be based and imposed, in part, upon recognition of the following legislative findings:

(a) The size of a building, so reflected by the total square feet, is a factor which affects the cost of providing fire protection and therefore the fees imposed hereunder are related in part to the size of the building.

(b) The use of a building is a factor which affects the cost of providing fire protection. Therefore, owner-occupied residential and commercial structures shall be classified separately. Commercial structure fires require additional equipment and personnel, and therefore it is the intent of this article that owners of owner-occupied residential structures pay a lesser charge for fire protection to reflect the reduced cost.

(c) Vehicles owned or used by City residents are susceptible to the hazards of fire. Therefore, such owners and lessees shall be considered users of fire protection service within the meaning of this article when the circumstances warrant it.

(d) West Virginia Code 8-13-13 requires that the charge be levied against all users of the service. No exemptions shall be granted to any subclass of users.

(e) "Owner" means the ultimate user of the fire protection service for the purpose of this article.

(f) A portion of the fire protection fee charged to owners of multi-unit residential buildings or structures is intended to be passed on to the tenants or lessees of each respective unit. Tenants or lessees are users of this service because they enjoy the protection of their personal belongings and their health as a result of the fee.

Section 773.03 Effective Date; Schedule of Payment Dates.

This article shall become effective July 30, 1985. The first fees charged under this article shall be for the period beginning July 1, 1985, and ending June 30, 1986, and shall be payable in installments on or before September 30, 1985, and March 31, 1986. Thereafter, the charges imposed, levied and assessed, as set out in this article, shall be upon owners of buildings and structures existing on July 1, of each succeeding fiscal year. The first installment of annual charges for succeeding fiscal years shall be due and payable on September 30 of each year, and the second installment shall be due and payable on March 31 of each year.

Section 773.04 Imposition of Assessment of Fire Protection Charge.

(a) Owner-Occupied Residential Buildings or Structures. There is hereby imposed, assessed and levied upon the respective owners of all single unit residential buildings or structures occupied by them, a fire protection service charge or fee in the amount equal to the total

square feet contained in the building multiplied by three cents (3 cents).

(b) Commercial Buildings or Structures.
There is hereby imposed upon respective owners of all commercial buildings or structures in the City a fire protection fee or charge in an amount equal to the total square feet contained in the building multiplied by three cents (3 cents).

(c) Governmental Buildings and Structures.
The City is hereby authorized to negotiate with the County, State and Federal Governments in order to fix an agreement with them so that the City may provide fire protection service to buildings and structures owned by these governments and located within the City.

* * * * *

Section 773.99 Penalty.

A penalty of ten percent (10%) of the assessed fire protection charge shall be added for failure to pay the installments due on the specified dates.

Additionally or in the alternative, whoever violates this article shall be fined not more than Five Hundred Dollars ($500.00) or imprisoned not to exceed thirty (30) days.

* * * * *

Section 955.01 Floodwalls. (June 8, 1987)

Section 955.20 Billing and Billing Periods.

The flood protection fee herein established shall accrue and become due and payable to the City from the persons and owners liable therefor on the same dates and for the same periods of time as the fire service fee now in effect, and shall be billed simultaneously and concurrently with such fire service fee, so that the combined billable total of both the fire service fee and the flood protection service fee shall, effective with the fiscal year commencing July 1, 1986, and ending June 30,

1987, amount to three and three-fourths cents ($0.0375)per square foot on the buildings and structures to which the service fees apply. It is hereby provided that the square footage to which the flood protection fee hereby enacted shall apply shall be the same as the square footage applicable for the purposes of the fire service fee computations.

Section 955.21 Effective Date.

This article shall be initially effective as of July 1, 1986, and all transactions herein contemplated, and all things and matters required herein to be done shall be done, accomplished or considered to have been done or accomplished as of such effective date.

* * * * *

Section 955.99 Penalty.

A penalty of ten percent (10%) of the assessed flood protection charge shall be added for failure to pay the installments due on the specified dates.

Additionally or in the alternative, the City may pursue remedies provided in Section 101.99 of the Administrative Code.

* * * * *

Municipal Service Fee (February 13, 1990).

Section 773.01 Statement of Policy.

The City provides its residents with the essential and special services of fire protection and flood protection. Under West Virginia Code 8-13-13, municipalities in the State are authorized to impose fees upon the users of these services to defray the costs of providing them. Inasmuch as revenues from other sources are insufficient to allow the City to provide these services adequately, it is necessary to impose a service fee upon the users thereof in order that these services may continue for the benefit of the residents of the City.

Section 773.02 "User" Defined.

For the purposes of this article, "user of municipal services" and "user" refers to any person, firm, corporation or governmental entity of any kind owning any building or structure, whether residential, commercial, governmental or otherwise, within the limits of the City which benefits from fire and/or flood protection services provided by the City.

Section 773.03 Imposition.

On and after July 1, 1990, there is hereby imposed upon all users of Municipal services a municipal service fee for each lot or parcel of land containing any building or structure owned by each user. The fee shall be imposed at an annual rate of Seventy Dollars ($70.00) per lot plus $0.0375 per square foot of floor space contained in each building or structure existing on each such lot.

* * * * *

Section 773.05 Delinquent Accounts.

Each installment of the municipal service fee shall be due within thirty (30) days of the date the bill is sent. Bills not paid within thirty (30) days of their issuance shall be considered delinquent. There shall be added to each delinquent account a penalty of five percent (5%) of the balance thereof on the thirty-first day after the bill has been sent. Thereafter, a penalty of five percent (5%) shall be added to the total outstanding balance at the end of each quarter.

* * * * *

Section 773.07 Enforcement.

The Director of the Division of Finance is charged with the enforcement of this article and may institute appropriate legal proceedings in the corporate name of the City for the collection of the municipal service fee from any user at any time such user's account is delinquent.

* * * * *

**AN ORDINANCE AMENDING, MODIFYING AND RE-ENACTING SECTIONS 773.03 AND 107.01(n) OF THE CODIFIED ORDINANCES OF HUNTINGTON, WEST VIRGINIA, TO ENACT MUNICIPAL SERVICE FEE CHARGES; TO DEDICATE FUNDS; AND TO IMPOSE RESTRICTIONS ON LEASE PURCHASES.** (April 2, 1991).

**BE IT ORDAINED BY THE COUNCIL OF THE CITY OF HUNTINGTON, CABELL AND WAYNE COUNTIES, WEST VIRGINIA,** that Section 773.03 of the Codified Ordinances of Huntington, West Virginia be amended, modified and re-enacted to read as follows:

Section 773.03 Imposition

(a) On or after July 1, 1991, there is hereby imposed upon all users of municipal services a municipal service fee for each lot or parcel of land containing any building or structure owned by each user. The fee shall be imposed at an annual rate of Eighty Dollars ($80.00) per lot plus $0.0575 per square foot of floor space contained in each building or structure existing on each such lot.

* * * * *

(c) Of the amount collected under this fee, the amount of $250,000.00 shall be allocated to improve streets and municipal infrastructure each year for the fiscal years 1991-1992, 1992-1993 and 1993-1994.

(d) Nothing contained in this Ordinance shall in any way affect the collectibility of any municipal service fees imposed prior to its effective date. This Ordinance is hereby declared to be a substantial re-enactment of the municipal service fee existing immediately prior to July 1, 1991.

* * * * *

## CONCISE STATEMENT OF CASE

Commencing in 1985, the City of Huntington, West Virginia (Huntington) assessed municipal fire and flood protection service charges

against buildings in the municipality owned by the United States Postal Service (Postal Service) and the United States General Services Administration (GSA). When the Postal Service and GSA refused to pay the charges, Huntington filed suit in the Circuit Court of Cabell County, West Virginia, seeking to collect the unpaid assessments and penalties. The Postal Service has refused to pay the charges since 1985. The GSA paid the charges until the last quarter of the 1989-1990 fiscal year.

The United States removed the case to the United States District Court for the Southern District of West Virginia. After determining that removal was improper, the United States filed a complaint in the District Court alleging that Huntington's assessments violated its absolute immunity from state and local taxation provided by the Supremacy Clause of the United States Constitution. The complaint sought an injunction prohibiting Huntington from assessing the municipal service charges against federal property, and a declaratory judgment that the United States was not liable for the assessments made against the Postal Service and GSA. Huntington filed an answer to the complaint asserting that the charges in question were permissible "users' fees" and not proscribed "taxes."

In addition, Huntington filed a counterclaim seeking the entry of judgment against the Postal Service and GSA for the outstanding balances, including penalties. The counterclaim covered the period July 1, 1985, through March 31, 1992. Huntington sought judgment against the Postal Service in the amount of $26,887.86 plus interest, court costs, and a reasonable attorney's fee. The counterclaim further sought judgment against the GSA in the amount of $19,770.01 plus interest, court costs and a reasonable attorney's fee.

The parties filed cross motions for summary judgment. On July 7, 1992, the District Court issued a memorandum opinion and order "essentially" granting Huntington's motion and "substantially" denying the Government's motion. Applying several tests, the Court held that the United States was not constitutionally immune from liability for the municipal service charges because the assessments were "users' fees" and not "taxes." In this regard, the Court concluded that the assessments represented "a reasonable attempt to charge those who use the service." In addition, the Court emphasized that the charges did not cover the cost of flood and fire protection services provided by the City, and were non-discriminatory in nature. The Court, however, held

that the United States was constitutionally immune from liability for the assessed penalties because "[t]here is no congressional authorization to permit Huntington to charge a penalty on the unpaid fire and flood service fees." Huntington did not appeal from the portion of the judgment order holding that the United States was constitutionally immune form liability for the penalties and does not seek review of that issue in this Court. A judgment order in conformity with the memorandum opinion was entered on July 7, 1992. On August 27, 1992, the United States filed a timely notice of appeal to the Fourth Circuit Court of Appeals.

The case was formally argued before the Fourth Circuit Court of Appeals on March 2, 1993. On June 10, 1993, the said Court rendered its decision reversing the judgment of the District Court and remanding the case back to the District Court with instructions to enter judgment in favor of the United States of America and against the City of Huntington. In essence, the Court of Appeals held that the fire and flood protection charges imposed by the City of Huntington were "taxes" and not "users' fees," and that the United States was constitutionally immune from such taxes. Huntington then filed a PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC with the Fourth Circuit Court of Appeals which were denied on July 6, 1993. Huntington then filed this PETITION FOR WRIT OF CERTIORARI with this Court within ninety (90) days of the date of denial of said Petition and Suggestion.

Counsel for the Petitioners asserts that this proceeding involves a question of exceptional importance. Virtually every Class I and Class II municipality in the State of West Virginia charges owners of buildings and dwellings located within their corporate boundaries a fire service fee assessed on the basis of square footage. Additionally, most of the said municipalities are dependent upon such a fee to support and maintain either a paid or volunteer fire department. The fire service protection fee charged by the City of Huntington is desperately needed to help the City meet an annual Fire Department budget of approximately 5.5 million dollars. Without the fire service protection fee, or the municipal service fee, as it is now called, the City of Huntington cannot continue to support and maintain its Fire Department. Ostensibly, a paid municipal fire department is a must for a municipality the size of the City of Huntington. The City's population is approximately fifty-five thousand (55,000), and its area covers seventeen (17) square miles. There are

also some twenty-one thousand (21,000) buildings and dwellings within the City's corporate boundaries. The City's Fire Department will answer an average of four thousand (4,000) calls annually, including structure fires, vehicle fires, brush fires, first-aid administration, operation of the jaws of life and the like. Approximately eighty-five percent (85%) of all owners of buildings and dwellings within the City's corporate boundaries have always paid this fee with no questions asked. Thus, the Court can see the obvious exceptional importance of this proceeding, and should grant the relief requested in this Petition.

## ARGUMENTS

1. The Fire And Flood Protection Charges Are Not Taxes On The United States And Are Not In Violation Of The Supremacy Clause Of The Constitution.

The Respondent has repeatedly contended that the Petitioner's fire and flood protection service fees are taxes. The Petitioner asserts to this Court that such fees are not taxes, but users' fees. These users' fees are charged to owners of buildings and dwellings within the corporate limits of the City of Huntington. It is believed that these property owners all have significant property interests to protect including protection from fire and flood damage. The Petitioner's Fire Department and Floodwall System provide these protection services.

It is stated in I Cooley, Taxation, Section 36 (4th Ed. 1924) that "Charges for services rendered, or for conveniences furnished, are in no sense taxes." Cited in *City of Charleston v. Board of Education of Kanawha County*, 209 S. E. 2d 55 (W.Va. 1974). Additionally, this Court has held in several cases that a charge by a municipality for services rendered or for conveniences provided is not a tax. See *Packet Co. v. Keokuk*, 95 U. S. 80, 25 L.Ed. 377 (1877), and *Huse v. Glover*, 110 U. S. 543, 7 S.Ct 313, 30 L.Ed 487 (1886), also cited in *City of Charleston v. Board of Education of Kanawha County, supra.*

In *City of Huntington v. Chianesi, et al.*, Circuit Court of Cabell County, West Virginia, Civil Action No. 84-290 (1985), the learned trial judge stated at Page 3 of his opinion regarding the constitutionality of these fees:

"The Court further finds that these fees are not taxes upon

property in violation of W.Va. Const., Article X, Section 1, known as the Tax Limitation Amendment, for they do not constitute taxes upon property *ad valorem* or otherwise."

The Court in *Chianesi* further commented on the City of Huntington's new fire and flood fee ordinances stating at Page 4 of its opinion:

> "It is only fair that with the new ordinances, though they are not here ruled upon, it appears that all users of these essential services shall pay equally and that the fees shall hereafter be collected in a timely, businesslike manner."

Most recently in the case of *City of Huntington vs. SGM, Inc.*, Circuit Court of Cabell County, West Virginia, Civil Action No. 91C-567 (1992), a case involving the issue of whether the Petitioner's fire and flood fee ordinances were a valid user's fee or a tax, the learned trial judge stated at Pages 1 and 2 of his opinion:

> ".....It is the Court's opinion that these items, fire and flood protection, are a service and not a tax. The manner of imposition authorized makes owners and tenants of all structures users and beneficiaries of these services....."

> ".....It is therefore the opinion of the Court that the fees challenged are constitutional and valid....."

In the case at bar, Judge Haden also found that the fire and flood fees charged by the Appellee were valid users' fees and not taxes. Judge Haden stated at Page 3 of his opinion:

> ".....Those who own buildings are the users of the fire and flood protection services.....the fees are a reasonable attempt to charge those who use the service. Moreover, the economic realities in this case indicate that the funds received from the fire service collections amount to only one-half of the Huntington Fire Department's annual budget. With the total cost of fire and flood protection exceeding the revenue produced by the fees, it cannot be said that the fee is a tax....."

> ".....Even though upon receipt of the fire and flood protection service fees the City of Huntington places those funds in a general revenue account, it can hardly be said that the funds are for the support of the local government. The fees are simply assessed against property owners to recoup funds expended for fire and flood protection....."

Judge Haden also stated at Pages 4 and 5 of his opinion:

> ".....the fire and flood service fees cannot be classified as a tax. The Postal Service and GSA enjoy the benefits of having Huntington's Fire Department readily available in case of fire. Unquestionably, if one of the governmental buildings at issue caught fire, the United States would expect the Huntington Fire Department to respond and extinguish the fire. To reap the benefits of the fire service, the Postal Service and GSA, like other building owners in Huntington, must pay the fire fee to have the service readily available. The same is true with flood protection service....."

Huntington is not imposing a tax upon the United States, but rather billing the United States for fire and flood protection services rendered to the buildings its owns within the City limits.

2. Federal law already provides that the United States Government shall pay a fire service or its parent jurisdiction for the support of fire protection services on federal properties.

15 U. S. C. 2210 states, in part, as follows:

Section 2210. Reimbursement for Costs of Firefighting on Federal Property.

(a) Filing of claims. Each fire service that engages in the fighting of a fire on property which is under the jurisdiction of the United States may file a claim with the Administrator for the amount of direct expenses and direct losses incurred by such fire service as a result of fighting such fire. The claim shall include such supporting information as the Administrator may prescribe.

(b) Determination. Upon receipt of a claim filed under subsection (a) of this Section, the Administrator shall determine-

(1) what payments, if any, to the fire service or its parent jurisdiction, including taxes or payments in lieu of taxes, the United States has made for the support of fire services on the property in question;

(2) the extent to which the fire service incurred additional firefighting costs, over and above its normal operating costs, in connection with the fire which is the subject of the claim; and

(3) the amount, if any, of the additional costs referred to in paragraph (2) of this subsection which were not adequately covered by the payments referred to in paragraph (1) of this subsection.

Not only does the federal statute provide for the filing of claims for payment and/or reimbursement for direct expenses incurred by a fire service "or its parent jurisdiction" in fighting a fire on federal property, but also the statute anticipates that the federal government may have already paid the "fire service or its parent jurisdiction" "taxes or payments in lieu of taxes,...for the support of fire services on the property in question." The federal statute also empowers the Administrator to determine "the extent to which the fire service incurred additional firefighting costs, over and above its normal operating costs, in connection with the fire which is the subject of the claim." Finally, the federal statute directs the Administrator to determine "the amount, if any, of the additional costs referred to in paragraph (2),... which were not adequately covered by the payments referred to in paragraph (1) ..." In other words, if the "taxes or payments in lieu of taxes" [user's fees in the case at bar for the support of fire services on the properties in question] are not sufficient to cover the costs of fighting a fire on federal property, the fire service may file a claim with the Administrator to recover "additional costs" "over and above its normal operating expenses." Obviously, the fire and flood protection fee is applied to and supports the normal and every day operations of the Huntington Fire Department and Floodwall System. The City of Huntington may file a claim with the Administrator pursuant to the statute, to recoup "additional costs" over and above the fire protection service fee. There is no question but that 15 U. S. C. 2210 anticipates and takes for granted

that the United States of America has in the past, is presently, or will hereafter pay a fire service or its parent jurisdiction, such as a city or municipality, a fire service fee, and further contains a "make-whole" provision in the event such fire fee is not sufficient to cover the costs of fighting a fire on federal property. It is also interesting to note that the statute refers to "taxes or payments in lieu of taxes" which "the United States has made for the support of fire services on the property in question." A strict, literal reading thereof leads a reasonable person to conclude that the statute acknowledges that a municipality may either impose a tax upon the United States for fire protection services or, as the City of Huntington is doing in this case, impose a users' fee therefor.

It is clear that the United States Congress, by enacting 15 U. S. C. 2210, has expressly consented to the United States being charged for fire service protection fees. 15 U. S. C. 2210 entitles the Appellee to be paid for these fees. The City reads the statute to mean that the United States has completely and totally waived any and all sovereign immunity from "taxes or payments in lieu of taxes" made by the United States for the support of a fire service. Thus, it can be argued that it is irrelevant whether the charges imposed by the City of Huntington are fees or taxes. Either way, the United States is liable for them.

3. There is a relevant difference between the square footage method of assessment and the ad valorem method.

Counsel for the Petitioner strongly disagrees with the Fourth Circuit Court of Appeals when it states in its Opinion at Page 6: "We are unable to discern any relevant difference between the square footage method of assessment and the *ad valorem* method." The Court is correct when it defines the *ad valorem* method as one "by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth." Under the square footage method, the cost of such service is apportioned on the basis of use, not wealth. Use is determined by size, not value. The larger the building or dwelling, the greater the fee. The smaller the building or dwelling, the smaller the fee. One sees the distinction most clearly when considering that a building or dwelling covering an area of only a few hundred square feet may be worth several thousands of dollars more than an empty warehouse containing several thousand square feet. However, the cost of providing a fire service to the latter would far

exceed that of the former. The square footage method is reasonably calculated to charge the property owner on the basis of use. The size of the building or dwelling determines the use. Wealth never comes into play in the square footage method of assessment.

The leading case in West Virginia which has addressed the square footage basis is *Streski v. City of Wheeling*, Circuit Court of Ohio County, West Virginia, Civil Action No. 83C-787-W (1984). In *Streski*, the Court held that a fire service fee using square footage as the basis of assessment was valid.

The Court also held that a fire service fee ordinance need not be perfect in order to be constitutional. The test is reasonableness, and a service fee ordinance which is not "inherently unreasonable," that is to say, one that is calculated to charge the actual users properly, within reasonable application costs, should be upheld. Also see *Ellison v. City of Parkersburg*, 284 S.E. 2d 903 (W. Va. 1981). In *Streski*, the Court held that the fire service fee ordinance based on square footage was reasonable and not unjustly discriminatory. The City of Huntington fire and flood fee ordinances are also based on square footage, and are reasonable and not unjustly discriminatory pursuant to the Court's ruling in *Streski, supra*.

The Plaintiff in *Streski* twice appealed to the West Virginia Supreme Court of Appeals and was twice rejected.

## CONCLUSION

WHEREFORE, YOUR PETITIONER PRAYS that the Court so grant it a Writ of Certiorari and review the issues presented herein and so find and hold that the Fourth Circuit Court of Appeals was clearly in error in reversing the ruling of the District Court; that the Court reverse the ruling of the Fourth Circuit Court of Appeals and remand this matter to the District Court with instructions to enter judgment in favor of the Petitioner and against the Respondent; and for such other and further relief as the Court deems just in this matter.

THE CITY OF HUNTINGTON,
WEST VIRGINIA
BY COUNSEL

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# APPENDIX

UNPUBLISHED

# UNITED STATES COURT OF APPEALS

## FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellant,*

v.

CITY OF HUNTINGTON, WEST VIRGINIA,
*Defendant-Appellee.*

No. 92-2074

Appeal from the United States District Court
for the Southern District of West Virginia, at Huntington.
Charles H. Haden II, Chief District Judge.
(CA-92-294-3)

Argued: March 2, 1993

Decided: June 10, 1993

Before HALL and LUTTIG, Circuit Judges, and HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation.

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Reversed and remanded with instructions by unpublished per curiam opinion.

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## COUNSEL

**ARGUED:** Edward T. Perelmuter, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Frederick G. Staker, III, City Attorney, THE CITY OF HUNTINGTON, Huntington, West Virginia, for Appellee. **ON BRIEF:** James A. Bruton, Acting Assistant Attorney General, Gary R. Allen, David

English Carmack, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Michael W. Carey, United States Attorney, Charleston, West Virginia, for Appellant.

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Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

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## OPINION

PER CURIAM:

The United States appeals an order declaring that federal agencies that own property in the City of Huntington, West Virginia ("City") are liable for the payment of a municipal service fee imposed by the City. We hold that the service fee is a tax from which the United States is immune, and, accordingly, we reverse.

I.

West Virginia Code § 8-13-13 authorizes any city that "furnishes any essential or special municipal service, including, but not limited to, police and fire protection . . . to impose upon the users of such service reasonable rates, fees and charges . . . ." In 1985, the City enacted an ordinance that imposed a "fire service fee" against owners of residential and commercial buildings. A flood protection fee was added in 1987, and, in 1990, these two fees were combined into a single "municipal service fee." Infrastructure improvements were added in 1991 as another purpose for which the fees could be used. From its inception in 1985, the fee has been assessed on the basis of square footage of the buildings in the City.[1] Civil penalties are available for delinquent accounts.

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[1]The square-footage method of assessment was a response to state constitutional limitations on *ad valorem* taxation. *See Hare v. City of Wheeling*, 298 S.E.2d 820 (W. Va. 1982); *City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 308 S.E.2d 527 (W. Va. 1983), *cert. denied*, 466 U.S. 958 (1984).

The City assessed the fee against federal agencies owning property in Huntington, including the General Services Administration ("GSA") and the United States Postal Service ("USPS").[2] These two agencies refused to pay the fee, and the City assessed penalties and instituted collection proceedings in state court. The United States then filed a complaint in federal court asking that the City be enjoined from assessing or trying to collect the tax against the GSA and USPS.[3] The federal agencies also requested that the court declare that they were immune from the fees.

On cross-motions for summary judgment, the district court ruled that GSA and USPS must pay the fees, but that they were not liable for penalties or interest. The United States appeals; the City does not cross-appeal the injunction against the collection of penalties and interest.

II

The general principle that states cannot tax the United States derives from Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Although the immunity of the federal government and its instrumentalities has been the source of often conflicting decisions, "[t]he one constant ... is simple enough to express: a State may not, consistent with the Supremacy Clause, U.S.Const., Art. VI, cl. 2, lay a tax 'directly upon the United States'.... [T]he Court has never questioned the propriety of absolute immunity from state taxation." *United States v. New Mexico*, 455 U.S. 720, 733 (1982) (quoting *Mayo v. United States*, 319 U.S. 441, 447 (1943)). *If* the service fee is a tax, then immunity is clear.

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[2]Since 1985, § 773.04(c) of the City code has provided as follows: "*Governmental Buildings and Structures*. The City is hereby authorized to negotiate with the County, State and Federal Governments in order to fix an agreement with them so that the City may provide fire protection service to buildings and structures owned by these governments and located within the City." The record does not disclose whether any attempt to negotiate with the agencies was ever undertaken.

[3]There are other federal agencies in the City that own property, but the order mentions only GSA and USPS. According to the appellant's brief, these other federal agencies are not parties to this litigation. Appellant's Brief at 10, n.14.

Although the Supreme Court has never established a specific standard for determining when a particular assessment is a tax, the Court has consistently adhered to the general rule that what must be considered is "the real nature of the tax and its effect upon the federal right asserted." *United States v. Allegheny County*, 322 U.S. 174, 184 (1944) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930)). The proper analysis to arrive at the real nature of the assessment is to examine "all the facts and circumstances . . . and assess them on the basis of economic realities . . . ." *United States v. City of Columbia, Mo.*, 914 F.2d 151, 154 (8th Cir. 1990).[4] Under this analysis, we conclude that the service fee imposed by the City is a tax in the most classic sense of the term.[5]

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[4]For the purpose of determining claim priority in the context of bankruptcy, the courts have established the following elements of a tax: "(a) An involuntary pecuniary burden, regardless of name, laid upon individuals or property; (b) Imposed by, or under authority of the legislature; (c) for public purposes, including the purpose of defraying expenses of government of undertakings authorized by it; and (d) Under the police or taxing power of the state." *In Re Lorber Industries*, 675 F.2d 1062, 1066 (9th Cir. 1982). The "user fee" at issue in the instant case clearly qualifies as a tax under this definition.

[5]The district court reached its result by three different tests, including the one we have chosen. The first test asked whether the fee is an enforced contribution to provide for the support of government. *See United States v. Maryland*, 471 F. Supp. 1030, 1036 (D. Md. 1979). It begs the question to conclude, as did the district court, that the service fee is not a tax because it is intended to recoup funds expended for fire and flood protection.

The third test derives from cases dealing with federal taxation of state governments. *See United States v. Maine*, 524 F. Supp. 1056 (D. Me. 1981) (applying a 3-part test: (1) is the charge imposed in a nondiscriminatory manner; (2) is the charge a fair approximation of the benefits received; and (3) is the charge structured to produce revenues that will not exceed the total costs to the government of the benefits to be supplied). Inasmuch as "[t]he states' immunity from federal taxation is more limited than the federal government's immunity from state taxation, and is based on a different constitutional source," (*United States v. City of Columbia, Mo.*, 914 F.2d 151, 153-54 (8th Cir. 1990)), we are of the opinion that the *United States v. Maine* test is inapplicable here.

The United States must pay reasonable user fees. For instance, charges for services from city-owned utilities are clearly fees for which the federal government would be liable to the same extent as any other customer. *See United States v. Harford Co., Md.*, 572 F. Supp. 239, 241 (D. Md. 1983) ("The federal government has . . . recognized its obligation to pay state or county charges based on the *quantum* of water or sewer services rendered.") (emphasis in original). But not every assessment tied to some state-provided benefit is a user fee.

Fire and flood protection and street maintenance are core government services. *See Mullen Benev. Corp. v. United States*, 290 U.S. 89 (1933) (United States immune from liability for "taxes in the nature of reassessments for sewers and sidewalks."); *see also Federal Reserve Bank v. Metro Center Improvement District #1*, 657 F.2d 183 (8th Cir. 1981), *aff'd*, 455 U.S. 995 (1982) (federal immunity from taxation includes immunity from special assessment on real estate owned by federal instrumentality); *United States v. Harford Co., Md.*, 572 F. Supp. 239 (D. Md. 1983) (front-foot assessment for the financing of county water and sewer construction projects are taxes from which the federal government was immune). Under the theory advanced by the City, virtually all of what now are considered "taxes" could be transmuted into "user fees" by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a "police fee."

User fees are payments given in return for a government-provided benefit. Taxes, on the other hand, are "enforced contribution[s] for the support of government." *United States v. La Franca*, 282 U.S. 568, 572 (1931). Liability for the "user fee" charged by the City arises from GSA's and USPS's status as property owners and not from their use of a City service.[6] *See Michelin Tire Corp. v. Wages*, 423 U.S. 276, 287 (1976) ("[Ad valorem] property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth . . . ").

[6]Indeed, the federal government has waived immunity to extent that it actually receives fire protection services. The City may file a claim against the United States for reimbursement of direct costs incurred putting out a fire on federally-owned property. *See* 15 U.S.C. § 2210(a).

We are unable to discern any relevant difference between the square-footage method of assessment and the ad valorem method. The service fee is a thinly disguised tax, and, as such, the USPS and GSA are immune from liability for it.

We reverse the judgment of the district court, and we remand with instructions to enter judgment for the United States.

*REVERSED AND REMANDED WITH INSTRUCTIONS*

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 7, 1993

No. 92-2074
CA-92-294-3

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

CITY OF HUNTINGTON, WEST VIRGINIA
Defendant-Appellee

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ORDER

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Appellant's filed a motin to publish the opinion.

The Court grants the motion.

Entered at the direction of Judge Hall, with the concurrence of Judge Luttig and Judge Howard, United States District Judge sitting by designation.

For the Court,

/s/ Bert M. Montague

Clerk

FILED: July 7, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-2074
CA-92-294-3

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

CITY OF HUNTINGTON, WEST VIRGINIA

Defendant-Appellee

ORDER

The Court amends its opinion filed June 10, 1993, as follows:

On the cover sheet, section 1 - - the status is changed from "UNPUBLISHED" to "PUBLISHED."

On the cover sheeet, section 6 - - the status line is corrected to read "Reversed and remanded with instructions by published opinion. Judge Hall wrote the opinion, in which Judge Luttig and Judge Howard joined."

On page 2, section 2 - - the statement dealing with use of unpublished opinions as precedent is deleted.

On page 2, first line of opinion - -"PER CURIAM" is corrected to read "HALL, Circuit Judge."

For the Court - By Direction

/s/ Bert M. Montague

Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. CIVIL ACTION NO. 3:92-0294

CITY OF HUNTINGTON, WEST VIRGINIA,
Defendant.

## MEMORANDUM OPINION AND ORDER

Pending are cross motions for summary judgment. Since the Court concludes that the fire and flood protection fee charged by the City of Huntington is a user fee rather than a tax, the Court essentially **GRANTS** the motion of the City of Huntington and substantially **DENIES** the motion of the United States of America.

The City of Huntington seeks to collect municipal fire and flood protection charges from the United States Postal Service (Postal Service) and the United States General Services Administration (GSA). Pursuant to statutory authority, the City of Huntington's ordinance establishes a fire and flood protection fee payable by property owners at the rate of 3-3/4 cents ($0.0375) per square foot. Failure to pay the fee results in civil and criminal penalties.

The Postal Service and GSA each own properties in Huntington. These buildings have been assessed fire and flood protection charges since 1985. The Postal Service has refused to pay the charges while GSA had paid its assessment each year.

The United States filed the present complaint seeking an injunction prohibiting Huntington from assessing, imposing, levying or collecting municipal service taxes from the Postal Service and GSA. The United States seeks a declaratory judgment that it is not liable for the assessed fees. Huntington in its counterclaim seeks the recovery of fees and penalties from the Postal Service and GSA.

States are without authority to tax the United States. McCullough v. Maryland, 17 U.S. (4Wheat) 316, 436 (1819): May v. U.S., 319 U.S. 441, 447-48 (1943); Kern-Limberick, Inc. v. Scurlock, 347 U.S.

110, 122 (1954); U.S. v. City of Spokane, 918 F.2d 84, 87 (9th Cir. 1990); U.S. v. City of Adair, 539 F.2d 1185, 1189 (8th Cir. 1976) Municipalities acting pursuant to state authority are likewise without authority to tax the United States. Since the Postal Service and GSA are instrumentalities of the United States, Huntington is precluded from imposing a direct tax on these entities.

A "tax" is an enforced contribution to provide for the support of government. U.S. v. Tax Comm'n of Miss., 421 U.S. 599, 606 (1975) (citing U.S. v. LaFranca, 282 U.S. 568, 572 (1931)). Although the United States enjoys immunity from local taxation it must pay reasonable user fees.

The United States urges the Court to apply three separate tests to determine whether the charges imposed by Huntington are taxes or fees. The first analysis required the Court to look at all the facts and circumstances and assess them on the basis of the economic realities in order to determine the essential nature of the exaction. U.S. v. Columbia, 914 F.2d 151, 154 (8th Cir. 1990). Under this test, the Court is persuaded that the fire and flood charges are fees rather than taxes. Although the exaction was enacted pursuant to a section of the West Virginia Code dealing with the state's taxing power, the fire and flood fees bear a reasonable relationship to the consuming public. Those who own buildings are the users of the fire and flood protection services. Although the ordinance is not perfect in assessing all those who use the service, for example, automobile owners, the fees are a reasonable attempt to charge those who use the service. Moreover, the economic realities in this case indicate that the funds received from the fire service collections amount to only one-half of the Huntington Fire Department's annual budget. With the total cost of fire and flood protection exceeding the revenue produced by the fees, it cannot be said that the fee is a tax.

The second analysis focuses on whether the exaction is enforced contribution to provide for the support of the Government. U.S. v. Maryland, 471 F.Supp. 1030, 1036 (D. Md. 1979) (citing U.S. v. LaFranca, 282 U.S. 568, 572 (1931)). Again, applying this test the Court concludes that the charges are fees rather than taxes. The fire and flood protection service fees generate revenue that is inadequate to meet the needs of the services provided. Even though upon receipt of the fire and flood protection service fees the City of Huntington places those funds in the general revenue account, it can hardly be said

that the funds are for the support of the local government. The fees are simply assessed against property owners to recoup funds expended for fire and flood protection.

The final analysis urged by the Government renders the same result. The third analysis is a three-prong test as follows:
(1) Is the charge imposed in a non-discriminatory manner? (2) Is the charge a fair approximation of the fenefits received? (3) Is the charge structured to produce revenues that will not exceed the total costs to the Government of the benefits to be supplied? U.S. v. Maine, 524 F.Supp. 1056, 1059 (D. Me. 1981)). The United States argues that Huntington's fire and flood protection charges are invalid under the first prong since Huntington exempts its own builidngs from the fire and flood service fees. This argument is wholly without merit. The fact that Huntington exempts its own buildings in order to reduce administrative costs to itself is not indicative of a discriminatory application of the suer fees. The property owners in the City of Huntington each pay the same amount per square foot for the service fee. This across-the-board flat fee is non-discriminatory in nature. By exempting its own buildings, the City of Huntington simply reaps the benefit os avoiding the bookkeeping work invovled in charging itself. This is not a discriminatory application of the ordinance.

Applying the second and third prongs, the fire and flood service fees cannot be classified as a tax. The Postal Service and GSA enjoy the benefits of having Huntington's fire department readily available in case of fire. Unquestionably, if one of the governmental buildings at issue caught fire, the United States would expect the Huntington Fire Department to respond and extinguish the fire. To reap the benefits of the fire service, the Postal Service and GSA, like other building owners in Huntington, msut pay the fire fee to have the service readily available. The same is ture with flood protection service. This, coupled with the fact that the service fees are inadequate to cover the cost of services indicates that the fire and flood protection charges are fees rather than taxes.

The Court concludes that the Postal Service and GSA must pay the fire and flood service fees to the City of Huntington. The attempt by Huntington to collect penalties or itnerest on the unpaid fees is another matter. The United States is immune from any exaction that seeks to punish the United States without express congressional authorization. See Missouri Pac. RR. Co. v. Ault, 256 U.S. 554, 563-65 (1921);

Smith v. Russellville Prod. Credit Assoc., 777 F.2d 1544, 1549 (11th Cir. 1985). There is no congressional authorization to permit Huntington to charge a penalty on the unpaid fire and flood service fees. Accordingly, the City of Huntington is without authority to assess penalties on the unpaid fire and flood service fees.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTERED: July 7, 1992

/s/ Charles H. Haden II

Charles H. Haden II, Chief Judge